

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-4108

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-4108

KENSTON TRUCKING COMPANY, INCORPORATED;
KENSTON WAREHOUSING CORPORATION; and
RHEIN EXPRESS, INCORPORATED,

Petitioners,

-v-

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON REVIEW FROM DECISION AND ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

JOINT APPENDIX

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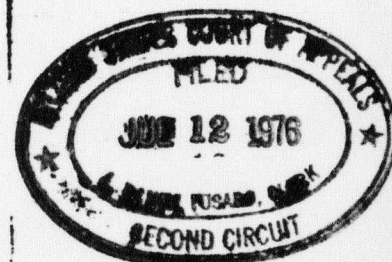


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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: Kenston Trucking Company, Inc.,
Kenston Warehousing Corp., and
Rhein Express, Inc.

Case Nos.: 29-CA-3184
29-CA-2888

8/27/73	Board's Decision and Order
6/11/75	Backpay Specification and Notice of Hearing
6/18/75	Request for extension of time to answer
6/23/75	Order extending time to answer
7/7/75	Request for additional extension of time to answer
7/8/75	Order extending time to answer
7/10/75	Answer to Backpay Specification
8/4/75	Hearing opened
8/4/75	Hearing closed
10/3/75	Administrative Law Judge's Supplemental Decision
10/29/75	General Counsel's exceptions to the Administrative Law Judge's Supplemental Decision
3/30/76	Board's Supplemental Decision and Order

1 Mr. Coffey?

2 MR. COFFEY: Your Honor, General Counsel takes
3 the position that -- our position in the matter of
4 Mr. Walker is stated in the back pay specification,
5 and as to the assertion by counsel for the Respondents
6 that there was an offer of reinstatement to Mr.
7 Walker during 1973, we maintain that if an offer
8 was made, it was not an unconditional offer, and unless
9 Respondent is prepared to adduce evidence at this
10 time, we move that the back pay specification be
11 adopted in its entirety.

12 However, if Respondent adduces evidence that
13 indicates a prima facie case has been made by him that
14 Mr. Walker was offered reinstatement we will adduce
15 evidence in rebuttal to that at that time.

16 Therefore, General Counsel rests.

17 JUDGE SILBERMAN: Very well.

18 You may proceed.

19 MR. GABA: I would like to have Mr. Walker
20 take the stand.

21 JUDGE SILBERMAN: Very well.

22 Mr. Walker, face me and raise your right hand.
23 Whereupon,

24 THOMAS WALKER

25 having been called as a witness, and having been first

1 duly sworn by the Judge, was examined and testified
2 as follows:

3 JUDGE SILBERMAN: Please be seated.

4 What is your name?

5 THE WITNESS: Thomas Walker.

6 JUDGE SILBERMAN: Where do you live?

7 THE WITNESS: 299 West 153rd Street, Manhattan.

8 JUDGE SILBERMAN: Manhattan, New York?

9 THE WITNESS: Yes.

10 JUDGE SILBERMAN: Are you the Thomas Walker
11 who was involved in the proceeding against Kenston
12 Trucking Company Cases 29-CA-3184 and 29-RC-2888?

13 THE WITNESS: I am, sir.

14 JUDGE SILBERMAN: You may examine him.

15 MR. GABA: Your Honor, you prefer if I stand?

16 JUDGE SILBERMAN: Whichever suits you.

17 DIRECT EXAMINATION

18 Q (By Mr. Gaba) Mr. Walker, are you married?

19 A Yes.

20 Q Do you have a family?

21 A Yes.

22 Q How many in your family?

23 A Well, there's just three kids right now, my wife
24 and I.

25 Q You wife and -- your wife died, did you say?

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A No.

It's just three kids now.

My wife and I and my other two daughters, they moved out.

Q In the spring and summer of 1973, how many people were living with you?

A In '73?

Q Yes.

A There was Roslyn, Harriet, Alveria, Arthur, and Bobby.

Q Five children and you and your wife?

A My wife wasn't with me right then.

Q So there were six people living together?

A Yes.

Q Do you remember offhand where you were working around this time two years ago, June, July, August?

A In '73?

Q '73.

A Yes.

Q Where were you working?

A I was working with Anchor Motor Freight.

Q What type of work were you doing for Anchor?

A I was a truck driver, driving cars.

Q Is that one of those tractor trailer type of trucks?

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A Yes.

Q You have several cars on it?

A Well, they have six and seven cars.

Q How long had you been working -- withdrawn.
When did you start working for Anchor?

A In September of 1972.

Q '72.

That was several months after you left Mr.
Luhrs' company?

A Yes.

Q Do you know how much you were earning per hour
or per week in 1973 for Anchor?

MR. COFFEY: Objection.

These figures are available if you want.

JUDGE SILBERMAN: Overruled.

What were you being paid by Anchor Motor
Freight?

THE WITNESS: We were paid by the trip.

JUDGE SILBERMAN: On what basis?

THE WITNESS: Depended on where you had to go.

JUDGE SILBERMAN: You want further explanation?

Q (By Mr. Gaba) Well, were you making trips more
or less to the same areas every week?

A No, sir.

Q Did your pay vary a lot every week?

1 A I would say I was averaging, I'd say about 3 --
2 about three hundred or better I was averaging.

3 Q Gross or net?

4 What I mean is before deductions three hundred
5 or after deductions?

6 A Net, I'd say.

7 Q You were netting three hundred a week?

8 A Yes.

9 Q And was that true in or about June of 1973?
10 You were working for Anchor in June of '73?

11 A Yes.

12 Q And making around three hundred dollars a week
13 net?

14 A Yes.

15 Q Now, did there come a time in or about June of
16 '73 where you had a telephone conversation with Mr.
17 Lhurs?

18 A Yes.

19 Q Do you remember around when that was or where
20 you were when you spoke to him?

21 A He called me at my homes.

22 It was --

23 Q All right.

24 That was in around June, was it?

25 A Yes.

1 Q And what did he say to you?

2 A Well, he asked me how I was doing.

3 I told him all right.

4 He asked me if I could come down and have a
5 little talk with him, see if we couldn't straighten
6 things out.

7 Q So you did that?

8 A I told him, yes.

9 Q And you did go to his warehouse?

10 A The next day, yes.

11 That was the warehouse.

12 There were no offices.

13 Q Was that the old place before he moved?

14 A That was at 800 Third Avenue.

15 Q 800 Third Avenue?

16 A Yes.

17 Q Is that the same location that you worked from
18 when you were working for him?

19 A Yes.

20 Q By the way, --

21 JUDGE SILBERMAN: May I suggest we identify who
22 Mr. Luhrs is for the -- for this record?

23 MR. GABA: Mr. Luhrs, Your Honor --

24 JUDGE SILBERMAN: His full name.

25 MR. GABA: John Luhrs is the President of Kenston

1 Trucking Company, Inc. and the President of Kenston
2 Warehousing.

3 Those are two of the named Respondents.

4 JUDGE SIBLERMAN: And Mr. Walker, you understood
5 that Mr. Luhrs was your boss when you worked for Kenston?

6 THE WITNESS: Yes.

7 JUDGE SILBERMAN: Right.

8 Q (By Mr. Gaba) Was Mr. Luhrs the one who hired
9 you initially when you worked for Kenston?

10 A Yes.

11 Q So you know him?

12 A Yes.

13 Q He is not a stranger to you?

14 What was your last rate of pay when you
15 were working for Kenston before you left?

16 A \$185.

17 Q \$185 a week?

18 A Yes.

19 Q That was before deductions, right?

20 A Yes.

21 Q So that working for Anchor, you were making
22 at least -- well, more than \$100 a week more than that,
23 right?

24 A Yes.

25 Q Now, how long had you been working for Anchor?

1 A When I was discharged?

2 Q When did you begin to work at Anchor?

3 A I went there in September.

4 Q I asked you that, I am sorry.

5 September 1972?

6 A Yes.

7 Q So you had been working there for a few months
8 by the time Mr. Luhrs spoke to you?

9 A Yes.

10 Q Now, you went down to the warehouse as he had
11 asked you, right?

12 A Right.

13 Q What day was that?

14 Was it during the week?

15 A It was on a Sunday.

16 Q On a Sunday?

17 A It was on a Sunday.

18 The date, I am not certain of what the date was.

19 It was Sunday when I went down there.

20 Q And did you go into the warehouse?

21 A Yes.

22 Q And did you meet with Mr. Luhrs?

23 A Yes.

24 Q Where did you meet with him?

25 A In the office there.

(UNDERLININGS ARE NOT PART OF STENOGRAPHIC TRANSCRIPT)

Q Was anybody else present besides you and Mr. Luhrs?

A No, sir.

I went there he was the only one there.

Q And did he ask you again what you were doing and where you were working?

A Well, he knew where I was working and everything. He didn't ask me that then.

Q Did he ask you how much you were making?

A No, sir.

Not at that time, he did not.

Q At anytime during that conversation on this visit to the warehouse, did you show Mr. Luhrs one of your pay stubs?

A Yes.

Q You remember that?

A Yes.

Q And how did that come about that you showed him the pay stub?

A Because of the money he offered me.

Q Well, didn't he ask you if you wanted to come back to work for Kenston?

A Yes.

Q Didn't he tell you that the Labor Board said that he was suppose to ask you to come back to work?

1 A No, sir. He did not say that.

2 Q What did he say?

3 A Well, he told me that the Labor Board was --
4 was giving him a hard time, and he asked me if I
5 wanted to come back to work.

6 Q What did you say to him?

7 A Well, at the time I told him no.

8 MR. GACA: I have no further questions, at this
9 time.

10 CROSS EXAMINATION

11 Q (By Mr. Coffey) Okay.

12 Mr. Walker, you say you went to see Mr. Luhrs
13 at his --

14 A Office.

15 Q -- at this office.

16 Can you tell us the entire conversation as far
17 as you remember it that took place between you and
18 Mr. Luhrs when you went to his office, omitting knowing,
19 as far as you can recall?

20 A I went in, I sat down, there was some money laying
21 on the desk there, some hundred dollar bills it was.

22 So I sat down.

23 And he asked me to come back to -- asked me if
24 I wanted to come back to work, he was going to give
25 me a thousand dollars.

1 And I could have my job back.

2 There was no mention about no back pay or nothing
3 like that, but just take the thousand dollars and sign
4 the papers that I will be willing to forget about
5 what happened, you know, between Labor Board and every-
6 thing, just forget it, I could have my job back with
7 the thousand dollars.

8 I told him --

9 Q You say he wanted you to sign some papers?

10 A Yes.

11 Q What kind of papers?

12 A Just saying that I would not press no charges
13 or nothing against the union, you know.

14 Q Against what?

15 A Against the union or the Labor Board.

16 Q Against them or with them or what?

17 A In other words, I would not press no charges
18 against nobdy.

19 I just be willing to forget the whole thing.

20 Q All right.

21 A And I could have a thousand dollars to go along
22 with it.

23 That's when mention about my pay come up.

24 I told him, I says I started work this week,
25 I says I work Thursday, Friday, Saturday and Sunday,

1 and I made little over \$700.

2 I said that's close to your thousand dollars
3 so why should a thousand dollars excite me now and
4 you owe me more than that.

5 That's when this mention of my pay come up.

6 Q And what did he say to you, if anything, at
7 that time?

8 A Well, he says, well, evidentially you are just
9 wasting my time, there's nothing we have further
10 to discuss.

11 I told him no, I guess it isn't.

12 Then I left there.

13 Q Now, was the offer of the thousand dollars
14 and the job and you signing the papers, was that
15 part of --

16 MR. GABA: I am going to object to that.

17 JUDGE SILBERMAN: I sustain it.

18 Mr. Walker, if you will pardon us for being
19 repetitious, I would like you to repeat your testimony,
20 but I am going to ask you a question, I want you
21 to answer it in the way I ask it.

22 And this is the question.

23 On this particular Sunday, it was in June
24 of 1973, correct?

25 THE WITNESS: Yes.

1 JUDGE SILBERMAN: Do you remember which date?

2 I show you a 1973 calendar.

3 Do you think by referring to the calendar
4 you can recall what specific day you met with Mr.
5 Luhrs?

6 (Handing document to witness.)

7 THE WITNESS: Precise date -- it was around the
8 17th -- I think it was the 10th or 17th.

9 JUDGE SILBERMAN: You think it was either June
10 10th or June 17th?

11 THE WITNESS: Yes.

12 JUDGE SILBERMAN: Very well.

13 Do you recall what time of day it was that
14 you met with him?

15 THE WITNESS: It was a little after 11.

16 JUDGE SILBERMAN: In the morning?

17 THE WITNESS: Yes.

18 JUDGE SILBERMAN: Now, this is my question:

19 Start from the very beginning, as best you can
20 now remember -- we understand you are talking about
21 an event that happened more than two years ago and
22 you are not going to remember everything precisely.

23 I want you to try to think back to that occasion
24 and tell us everything that happened, and everything
25 that was said as best that you can now remember, and

1 in the order that it happened?

2 THE WITNESS: Well, when I first went there,
3 I rang the bell, he come and open the door.

4 I went in.

5 We spoke to each other, and greeted each other,
6 and then we had some coffee.

7 We sat down.

8 We drank coffee.

9 We was talking.

10 And then --

11 JUDGE SILBERMAN: Do you remember the things
12 you were talking about before you got down to business?

13 THE WITNESS: Just merely talking about how he
14 was doing, you know, like that, passing time.

15 And then that's when --

16 JUDGE SILBERMAN: Go ahead.

17 Just tell us what you remember?

18 THE WITNESS: He told me, he says see that
19 money on the desk.

20 I said yes.

21 He says, well, if you want you can take up a
22 thousand dollars.

23 He says all you have to do is agree that you will
24 forget everything that happened, you know, concerning
25 this here trouble, to sign the papers saying you are

1 willing to forget it, and I would be given my job
2 back.

3 That's when I told him, I says, well, I says
4 a thousand dollars looks good, I say, but I am not
5 money hungry right now.

6 I say lask week I only worked four days last
7 week and I made over \$700 in them four days.

8 I says so why should I -- should a thousand
9 dollars excite me and I got a thousand dollars right
10 now you might as well say.

11 So then he says, well, talking to you is no
12 good, we can't reach no decision, you are just wasting
13 my time.

14 I guess I am.

15 You are wasting mine too. So then I got up
16 and I left.

17 JUDGE SILBERMAN: When did you show Mr. Luhrs
18 your pay stub?

19 THE WITNESS: While I was in the office there.

20 JUDGE SILBERMAN: At what point in the conversation
21 did you show him your pay stub?

22 THE WITNESS: After this money was mentioned?

23 JUDGE SILBERMAN: What did you do?

24 THE WITNESS: I showed him what I had made,
25 and he told me he says well you are making this kind

1 of money, I might as well come up there and work
2 up there myself.

3 JUDGE SILBERMAN: What did you say?

4 THE WITNESS: I told him well, they are hiring.
5 That's what I said to him.

6 JUDGE SILBERMAN: You gentlemen want to ask any
7 further questions? Mr. Coffey?

8 Q (By Mr. Coffey) Did any -- withdrawn.

9 At anytime while you were in Mr. Luhrs office
10 did Mr. Luhrs ever tell you you could have your job
11 back irrespective of whether you signed papers or
12 took the thousand dollars or was it all a package
13 deal?

14 MR. GABA: I object to the form of the question.

15 JUDGE SILBERMAN: I sustain.

16 MR. GABA: The suggestion the answer --

17 A In other words, the only way I would have
18 received the money, have my job back, was by accepting
19 his offer.

20 If I didn't accept the offer, I would not have
21 my job back.

22 JUDGE SILBERMAN: What did he say that leads you
23 to that conclusion?

24 THE WITNESS: Because when I refused the offer,
25 he says, well, we can't come to no kind of decision.

1 JUDGE SILBERMAN: As to what, as to the thousand
2 dollars?

3 THE WITNESS: Well, he was referring to the
4 job too because he did not tell me I could come back
5 to work for him unless I accepted that offer.
6

7 In other words, without the offer, he was not
8 going to give me no job and he didn't make it clear
9 at no time he was going to give me the job without
10 accepting the -- no offer.

11 JUDGE SILBERMAN: What offer?

12 THE WITNESS: Of the money.

13 JUDGE SILBERMAN: For what?

14 THE WITNESS: To forget everything that had
15 transpired, in other words.

16 JUDGE SILBERMAN: You have any further
17 questions?

18 MR. COFFEY: No, Your Honor.

19 MR. GABA: May I see the statement that Mr.
20 Walker made?

21 MR. COFFEY: He gave two on this particular
22 subject a shorter one --

23 MR. GABA: May I have a moment to look at
24 them?

25 JUDGE SILBERMAN: Off the record.

(Discussion off the record.)

1 JUDGE SILBERMAN: On the record.

2 REDIRECT EXAMINATION

3 Q (By Mr. Gaba) Mr. Walker, after you had this
4 meeting with Mr. Luhrs in June of 1973, did you report
5 that information to Mr. Coffey or somebody else at the
6 Labor Board?

7 A Yes.

8 Q You called them up and told them or was it
9 Mr. Coffey that got in touch with you?

10 A Well, he got in touch with me, and I was suppose
11 to come in, because he was going to go over the case.

12 And then I told him about the meeting that
13 I had.

14 Q So you spoke to Mr. Coffey about what you just
15 testified to, right?

16 A Yes.

17 Q And while you were talking to him he was asking
18 you questions and writing things down?

19 A He told me to explain it to him just how it
20 happened.

21 I explained it to him.

22 Q And he wrote some things down on a paper?

23 A Wrote as I was explaining to him.

24 Q And what did you do with the paper, did he
25 show it to you?

1 A Well, I had to initial the paper.
2 Q And what else?
3 A I signed it.
4 Q Did you read it carefully?
5 A Yes, I read what I had said.
6 Q Well, I mean, this was written in Mr. Coffey's
7 handwriting?
8 A Yes.
9 Q It wasn't typed -- typewritten or anything?
10 A No.
11 Q Did you read this over carefully and --
12 A Yes, I did.
13 Q And you signed it?
14 A Yes.
15 Q Did you tell Mr. Coffey that there was a pile
16 of hundred dollar bills?
17 A Yes.
18 Q What do you mean by a pile?
19 A Well, money was laying on the desk, hundred
20 dollar bills.
21 They wasn't up tight, you know what I mean,
22 in other words, they were scattered.
23 I could see them.
24 Q Did you count them?
25 A No. I did not count them.

1 Q Did Mr. Luhrs tell you how much money was in
2 that pile?

3 A He told me there was a thousand dollars there
4 I could have.

5 Q Now, you knew at the time that you went to see
6 him that the Labor Board had decided the case in
7 your favor about your being fired?

8 You knew that, right?

9 A Say that again?

10 Q At the time you went to see Mr. Luhrs in the
11 warehouse in June of 1973, you knew that the Labor
12 Board had decided the case in your favor, that you
13 had been improperly fired?

14 A Yes.

15 Q You knew that?

16 A Yes.

17 Q And you also -- knew also, did you not, that
18 the NLRB or the Labor Board was going to try an get
19 some back pay money for you?

20 A Yes.

21 Q You knew that?

22 A Yes.

23 Q And when you went to see Mr. Luhrs you had a
24 figure in your mind, didn't you, of what you thought
25 he owed you at that time?

1 A Yes.

2 Because I told him it would come to more than
3 that.

4 MR. COFFEY: Objection.

5 JUDGE SILBERMAN: Overruled.

6 Q (By Mr. Gaba) And at the time you went to see
7 Mr. Luhrs in June of 1973 you were working?

8 A Yes, I was working.

9 Q And Mr. Luhrs, after conversation with you,
10 knew that you were making more than \$185 a week, right?

11 A Yes.

12 Q He knew that you were making substantially
13 more than \$185 a week?

14 A One thing I would say --

15 Q Just answer my question, he knew that?
16 You told him, right?

17 A Right.

18 Q Now, can you therefore think of any reason
19 why he would offer you a thousand dollars not to
20 come back to work?

21 MR. COFFEY: Objection.

22 JUDGE SILBERMAN: I don't understand your question.
23 I suggest you rephrase it.

24 Q (By Mr. Gaba) You discussed or at least you said
25

1 in your testimony just recently that Mr. Luhrs
2 wanted you to forget about everything that had
3 happened, right?

4 A Yes.

5 Q And he wanted you to forget about the back pay,
6 correct?

7 A Yes.

8 Q And he was going to give you a thousand dollars
9 cash?

10 A Yes.

11 Q Now, if you had accepted the thousand dollars,
12 right, and if you had said to Mr. Luhrs, okay, I
13 will forget about the back pay, you wouldn't have gone
14 back to work there any way, right?

15 MR. COFFEY: Objection.

16 JUDGE SILBERMAN: Off the record.

17 (Discussion off the record.)

18 JUDGE SILBERMAN: On the record.

19 I shall sustain the objection to the pending
20 question.

21 MR. GABA: May I just ask that the question
22 be read back so I can --

23 JUDGE SILBERMAN: Surely.

24 (Record read.)

25 Q (By Mr. Gaba) Mr. Walker, the discussion about

1 the thousand dollars that you had with Mr. Luhrs,
2 that took place right at the tail end of the
3 conversation, isn't that correct, just before you left?

4 A Just before I left?

5 Q Yes.

6 A Yes.

7 Q And before you had gotten up to leave, which
8 I assume you did get up to leave at some point, didn't
9 Mr. Luhrs ask you, I am not saying these are the exact
10 words, but didn't he ask -- didn't he say to you you
11 can come back here and have your old job back?

12 At some point in the conversation didn't he
13 say that?

14 A No, sir.

15 Q And at some point in that conversation didn't
16 you say to him in words or substance, why should
17 I come back and work for you, I am making much more
18 in my other job than I ever made here?

19 MR. COFFEY: Asked and answered, Your Honor.

20 JUDGE SILBERMAN: Overruled.

21 Answer the question.

22 A Is that suppose to be a yes or no or can I --

23 JUDGE SILBERMAN: Please read the question.

24 (Record read.)

25 JUDGE SILBERMAN: If you can answer the -- it yes or

1 no, if you can't tell us and I will listen to your
2 answer.

3 A Well, at the time I said why should I come back
4 to work because I was not offered my old job back
5 at the time, so that's why I said why should I come
6 back to work under that conditions, less than what
7 I should have.

8 JUDGE SILBERMAN: Explain that, come back to
9 work for less than you should have?

10 THE WITNESS: Yes.

11 JUDGE SILBERMAN: Is that what you said to Mr.
12 Luhrs?

13 THE WITNESS: Yes.

14 JUDGE SILBERMAN: And explain to us what you
15 meant when you said to Mr. Luhrs why could I come
16 back to work at less than I should have?

17 THE WITNESS: Because --

18 JUDGE SILBERMAN: What did that mean?

19 What does it mean?

20 THE WITNESS: It meant that the Labor Board had
21 told me what he owed me and it was more than the -- than
22 what the thousand dollars was.

23 That's what I mean by less.

24 JUDGE SILBERMAN: What about your weekly salary?

25 THE WITNESS: Well, we didn't discuss no weekly

1 salary at the time.

2 No salary was discussed through the entire
3 discussion we had, no salary was discussed.

4 Q (By Mr. Gaba) Mr. Walker, from your answer
5 I gather that you were aware or you had discussed
6 with somebody at the Labor Board that one of the
7 things they wanted Mr. Luhrs to do was to offer you
8 your job back, isn't that correct?

9 That was part of the case?

10 A Yes.

11 Q That you had to get your job back if you wanted
12 it?

13 A Yes.

14 Q And did Mr. Coffey or anybody else up here
15 at the Labor Board tell you that Mr. Luhrs would
16 have to offer you the same salary that you were
17 making when you left?

18 They didn't say he'd have to pay you more,
19 did they?

20 A No, sir, they did not.

21 Q So you know that all he had to do was pay
22 you \$185 a week?

23 A Yes.

24 Q And you also knew or at least it seems from
25 your prior testimony you knew that the National
Labor Relations Board told you how much he owed, right?

1 A Yes.

2 Q And you knew the NLRB was representing you in
3 this case?

4 A Yes.

5 Q And you knew, didn't you, that you couldn't
6 settle this case without their okay?

7 MR. COFFEY: Objection, Your Honor.

8 JUDGE SILBERMAN: Overruled.

9 Did you know that?

10 THE WITNESS: That I could settle it without
11 them?

12 JUDGE SILBERMAN: That you could settle a case
13 without the approval of the National Labore Relations
14 Board?

15 THE WITNESS: I did not know.

16 JUDGE SILBERMAN: All right.

17 Q (By Mr. Gaba) You say you didn't know that.

18 Now, you mentioned that Mr. Luhrs said
19 he had wanted you to sign some papers.

20 Did he give you anything to read, any papers
21 to read?

22 A No, he did not hand me the papers, no.

23 Q Isn't it a fact that he didn't even have any
24 papers prepared on his desk, typewritten papers?

25 A That I do not honestly know what type of papers

1 he had on his desk.

2 Q But he didn't offer to show you any papers
3 for you to sign?

4 A No.

5 MR. COFFEY: Would Your Honor make judicial
6 notice --

7 JUDGE SILBERMAN: Let counsel finish.

8 You will have your turn at examining.

9 Q (By Mr. Gaba) Mr. Walker, did there come a
10 time when you left the employ of Anchor?

11 A Yes.

12 Q When was that?

13 A I left them in -- the decision came up in
14 January '74.

15 Q January of '74?

16 A Yes.

17 Q Now, during the hear of 1974 who else did you
18 work for?

19 MR. COFFEY: Objection, Your Honor.

20 Outside the scope of redirect.

21 JUDGE SILBERMAN: Overruled.

22 Answer the question.

23 A In '74?

24 Q Yes.

25 A '74 I worked for no one in '74.

1 In the prior case Mr. Luhrs asked Mr. Walker
2 and other people to sign a document withdrawing from
3 the union and that document was not typed.

4 I'd like to -- you to take notice of that.

5 MR. GABA: I certainly object to that as having
6 no bearing on the issue here.

7 JUDGE SILBERMAN: To the extent that I think the
8 findings of Judge Seff is relevant to this case.

9 I will take notice of them.

10 DIRECT EXAMINATION

11 Q (By Mr. Gaba) Mr. Luhrs, you are an officer --

12 JUDGE SILBERMAN: First state your name and address?

13 THE WITNESS: John Luhrs, 2223 East 19th Street,
14 Brooklyn, New York.

15 Q Mr. Luhrs, are you the president and sole stockholder
16 of Kenston Trucking Company, Inc.?

17 A Yes, I am.

18 Q And of Kenston Warehousing Corporation?

19 A Yes, I am.

20 Q Did there come a time in or about June of 1973
21 where you spoke to Mr. Walker on the telephone?

22 A Yes, there was.

23 Q And you -- and would you state what -- when
24 that conversation took place and what you said to
25 Mr. Walker and what he said to you?

1 A I don't remember exactly when it took place,
2 but it was around that period of time.

3 And the reason for the phone conversation was
4 to arrange a meeting with -- where we could sit down
5 and talk over our differences.

6 Q And you did speak to him on the phone?

7 A Yes, that's right.

8 Q What did you say to him and what did he say
9 to you?

10 A Well, I asked him how he was, and if he could
11 come down and talk to me.

12 And he said yes, he would.

13 Q In the course of that conversation, did you at any-
14 time ask him where he was working?

15 A No, I did not.

16 Q Did you know where he was working at that time?

17 A Yes.

18 Q How did you learn that?

19 A From some of the other employees that I have.

20 Q Did you agree to meet -- I should say did Mr.
21 Walker agree to meet with you?

22 A Yes, he did.

23 Q Was a time and date set?

24 A Yes, it was for Sunday of that week.

25 Q And did Mr. Walker come to your office at that
time?

1 A Yes, he did.

2 Q And what took place at your office?

3 A Well, I invited him in, and we sat down, and we --
4 for about the first half hour just discussed what
5 each other had been doing, he asked me how things
6 were going with the business and I asked him what
7 he had been doing with his job and so forth.

8 Q And in the course of that preliminary conversation
9 did he tell you how much money he was making?

10 A I don't know if it was in that course of the
11 conversation, no.

12 Q Well, sometime during the course of the entire
13 conversation you got around to the subject matter that
14 you had invited him down to discuss, isn't that correct?

15 A Right.

16 Q What was -- well, how did that conversation go,
17 and as far as you can just state what you said to
18 him, and what he said to you?

19 A All right.

20 Well, after we had gotten friendly part of the
21 conversation over with, I asked him if he was willing
22 to come back to work for me, and he said -- and he
23 asked me at what rate of pay would he -- would he be
24 coming back at.
25

1 And I told him that it would be at the rate of
2 pay that he was making when he left.

3 At that time he laughed at me and showed me
4 his pay check of what he was making or what he had
5 made for the previous week.

6 Q What happened after that?

7 A Well, we had some discussion about it.

8 I told him that I thought it was very good,
9 I think I even told him he'd be foolish to leave it,
10 that he was making that kind of money, that he should
11 stay there.

12 Q In the best that you can recall what was the
13 language that you used in terms of asking Mr. Walker
14 if he wanted to come back and work with you?

15 A It's a couple of years ago.

16 I really can't remember exactly.

17 But I did ask him, you know, if he was satisfied
18 where he was or if he wanted to come back to work,
19 so forth.

20 Q So there's no question in your mind that you
21 did offer him a job to come back to work?

22 A No, there is not.

23 Q There is no question in your mind?

24 A No.

25 Q And there's no question in your mind that he

1 turned you down?

2 A No.

3 Q Now, you have heard Mr. Walker testify, and
4 you heard him make reference to a sum of money that
5 he said was laying on your desk, and some other
6 discussions concerning back pay.

7 Now, I don't want to lead you in anyway, I
8 will just ask you, was there some discussion that
9 concerned back pay?

10 A Yes, there was. When --

11 Q When did this take place during the course of
12 the conversation, and what was said?

13 A Well, it was in the latter part of the conver-
14 sation, when he was getting ready to leave, I asked
15 him if he didn't want to come back to work, could
16 we discuss some kind of settlement about back pay
17 to end the proceedings with the NLRB.

18 Q What did he say?

19 A He said that -- you know, what kind of offer
20 or, you know, somehow we got talking about what
21 would he want and what I would be willing to give.

22 Q Well, did you make him an offer or did he ask
23 for money?

24 I mean, how did that work?

25 A He didn't ask for money. But he did ask me,

1 you know, what I thought or what I would be willing
2 to settle for or something like that.

3 Q Did you give him a figure?

4 A Yes.

5 That's when the thousand dollar figure came up.

6 Q What did he say in response to that?

7 A He said that a thousand dollars wasn't enough,
8 and that he had worked all of his life and he didn't
9 have anything to show for it, and that this was the
10 first opportunity that he ever saw to make a bundle,
11 and he was going to ride it until the end, to get
12 his bundle.

13 Q Did you at anytime offer him any cash money?

14 A No, sir.

15 Q Did you have any cash lying on your desk?

16 A No, I did not.

17 Q Did you have any conversation with Mr. Walker
18 about him signing any documents?

19 A I don't remember.

20 I might have said that if he accepted the thousand
21 dollars, that he would have to sign something saying
22 that it was agreeable, that it had nothing to do with
23 offering him a job back or, you know, when -- one thing
24 had nothing to do with the other, but I would need
25 some kind of proof of payment to him so that I could
 show the Board that he accepted.

1 Q Now, at the time that you had this conversation
2 with Walker, you were represented by counsel, isn't
3 that correct?

4 A Yes, I was.

5 Q And as a matter of fact you were represented
6 by me?

7 A That's right.

8 Q Isn't that true?

9 A Yes.

10 Q And isn't it also a fact that I advised you that
11 it was part of your responsibility, at least part
12 of the corporation's responsibility to offer certain
13 employees their jobs back?

14 A I was well aware of the rules and regulations,
15 yes.

16 Q And you were aware, were you not, that the offer
17 had to be unconditional?

18 A Yes.

19 Q At anytime during the conversation with Mr. Walker
20 on this Sunday in your office did you tell him that
21 he could have his job back only if he took the
22 thousand dollars?

23 A No, I did not.

24 Q Did you tell him that he could have his job
25 back only if he signed certain papers for you?

1 A No, I did not.

2 Q And isn't it a fact -- withdrawn.

3 Now, at the time you offered Mr. Walker --
4 actually offered him his job, you knew that he was
5 making more money than you had been paying him,
6 isn't that so?

7 A Yes, it was.

8 Q Now, if Walker had agreed to come back to work
9 for you you would have had to lay off somebody else,
10 isn't that correct?

11 A Yes, I would have.

12 I didn't have any openings at the time so I would
13 have to let somebody go.

14 Q And you were prepared to do that?

15 A Yes, I was.

16 MR. GABA: I have no further questions at this
17 time.

18 MR. COFFEY: I'd like a couple of minutes,
19 Your Honor?

20 JUDGE SILBERMAN: Take a five minute recess.

21 (Recess taken.)

22 JUDGE SILBERMAN: On the record.

23 The hearing will come to order.

24 MR. COFFEY: General Counsel rests.

25 JUDGE SILBERMAN: You have no questions to
ask the witness?

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

KENSTON TRUCKING COMPANY, INC.
KENSTON WAREHOUSING CORP., and
RHEIN EXPRESS, INC.

and

Case 29-CA-3184

GEORGE HILL, an Individual

and

Case 29-CA-2888

LOCAL 808, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA

Vincent J. Coffey, Esq. of
Brooklyn, N.Y., for
General Counsel

Richard M. Gaba, Esq. of
Mineola, N.Y., for
Respondent

Mr. Thomas Simcox, Business Agent, of
Queens, N.Y., for Union

SUPPLEMENTAL DECISION

HERBERT SILBERMAN, Administrative Law Judge: This proceeding to determine the amounts of backpay due to seven employees under the terms of the Decision and Order of the National Labor Relations Board, reported at 205 NLRB 1050 (1973), 1/ was initiated by service on the parties of a backpay specification, dated June 11, 1975, prepared by the National Director for Region 29. 2/

1/ The Respondent in the cited case is Kenston Trucking Company, Inc. On March 11, 1975, a stipulation was entered into by Kenston Trucking Company, Inc., Kenston Warehousing Corp., and Rhein Express, Inc., which provides that for the purpose of the instant proceeding, Rhein Express, Inc. and Kenston Warehousing Corp.

Supplemental Decision (Cont.)

Pursuant to notice, a hearing was held in Brooklyn, New York, on August 4, 1975. At the hearing, the parties entered into an agreement providing for the settlement of the amounts of backpay due to Richard Parker, John Barr, Frank Stewart, Salvatore DeChristiani, Joseph Barrier, and George Hill. I have been advised by the Compliance Officer for Region 29 that Respondents have made all the payments required to be made pursuant to the terms of the settlement. An issue remains as to the amount of backpay due to Thomas Walker. Upon consideration of the pleadings, the arguments made on the record in the case, the brief filed by General Counsel, the entire record in this case, and from my observation of the witnesses, I find as follows:

Amount in Dispute

According to the specification, the backpay period commenced during the week ending May 12, 1972, and terminated on February 21, 1975, when Thomas Walker sustained a back injury and no longer was capable of performing the type of work he had performed when in Respondents' employ.

The parties agree that in accordance with the backpay specification there is owed to Thomas Walker the sums of \$481, \$85, and \$1,532 for the period beginning with the week ending May 12, 1972, and ending at the end of the third quarter in the year 1972. Thus, the parties are in agreement that a total of \$2,098, plus interest, is due to Thomas Walker for that period of time.

No backpay is claimed to be due to Thomas Walker for the fourth quarter of 1972 and for the entire year of 1973 because during that period Walker's actual quarterly earnings exceeded the amounts he would have earned had he been employed by Respondents.

"constitute an integrated enterprise and are the successors in interest to Kenston Trucking Company, Inc., the Respondent in these proceedings."

2/ The specification was amended during the backpay hearing.

Supplemental Decision (Cont.)

In dispute is whether Walker is entitled to receive backpay from the Respondents for each of the quarters in 1974 and for the first quarter in 1975 through February 21, 1975. The amounts set forth in the backpay specification as being due to Thomas Walker for those five quarters are not in dispute. Respondents' claim, however, is that in June 1973 Thomas Walker was offered unconditional reinstatement to his former job and refused to accept such reinstatement, and for that reason Walker is not entitled to backpay thereafter.

The Evidence

When Thomas Walker was discharged by Respondents, he was employed as a truckdriver at a gross weekly salary, before all deductions, of \$185. In September 1972, Walker obtained a permanent position with Anchor Motor Freight as a truckdriver. Walker was discharged by Anchor Motor Freight approximately 16 months later, in January 1974, because he had been involved in a vehicular accident. While Walker worked for Anchor Motor Freight he earned approximately \$300 per week net, after all deductions, or about twice the amount he earned when he had been employed by Respondents.

Walker met with Respondents' president, John Luhrs, at the latter's request, on a Sunday, either June 10 or June 17, 1973, at Respondents' premises. (The Decision of Administrative Law Judge Bernard J. Seff in the instant case issued on April 27, 1973. Exceptions to the Decision were filed by Respondents, and the Board's Decision issued on August 27, 1973) During this meeting Luhrs offered to reinstate Walker to his former position. The only question is whether, as testified to by Luhrs, the offer was unconditional or, as testified to by Walker, the offer was conditioned upon Walker settling his backpay claim against Respondents for the sum of \$1,000. Walker testified that previous to the meeting he had been advised by a representative of the Board that Respondents owed him more than \$1,000 as backpay.

In substance, Walker testified that after an exchange of pleasantries Luhrs pointed to a pile of \$100 bills laying on his desk and said to him that he could take up to \$1,000. Luhrs further said that for the \$1,000 Walker would have to

Supplemental Decision (Cont.)

"forget everything that happened. . . concerning this here trouble, to sign the papers saying you are willing to forget it" and he would be given his job back. Walker replied that although \$1,000 looked good, he was not money hungry because during the previous week, when he had worked only 4 days, he had made more than \$700. Walker showed Luhrs his pay stub. Walker then said that \$1,000 didn't excite him and Respondents owed him more than that amount. According to Walker, Luhrs responded, "(T)alking to you is no good, we can't reach no decision, you are just wasting my time." Walker replied that Luhrs also was wasting his (Walker's) time and left.

John Luhrs testified that in their conversation he asked Walker if Walker was willing to return to work. ^{3/} Walker asked at what rate of pay and Luhrs replied it would be at the same rate of pay he had been earning when he last worked for the Company. Walker laughed at the offer and showed Luhrs his paycheck for the previous week. According to Luhrs, he made an unequivocal offer of reinstatement to Walker and Walker clearly turned down the offer. Before Walker left, Luhrs asked whether they could discuss a settlement with respect to the backpay so as to conclude the NLRB proceedings. Walker asked Luhrs what his offer was and Luhrs suggested the figure of \$1,000. Walker replied that \$1,000 was not enough, that he had worked all his life and did not have anything to show for it, that this was the first opportunity he had to make a bundle, and that he was going to ride it until the end to get his bundle. Luhrs denied that he had any cash lying on his desk. Luhrs further testified that before he spoke with Walker he had consulted counsel and counsel had advised him with respect to the Company's obligations in the matter and that an offer of reinstatement had to be unconditional. Luhrs was not cross-examined by General Counsel or by the Union's representative.

^{3/} I disagree with General Counsel's contention that Luhrs did not offer reinstatement to Walker but merely was inquiring what Walker would do should such an offer be made.

Supplemental Decision (Cont.)

Both Walker and Luhrs testified at the instant hearing about a conversation that had taken place 2 years earlier. Further, both Walker and Luhrs understood at the time they testified that critical to the decision in this case is whether the admitted offer of reinstatement was made with or without any condition attached. It is not surprising, in the circumstances, that the recollections of the parties concerning their conversation favor their respective positions. Luhrs testified only briefly. No attempt was made to impeach his testimony by cross-examination. Luhrs' testimony was short, straightforward, and unimpeached. It appears from his testimony that after Administrative Law Judge Seff issued his Decision, Luhrs sought to settle Respondents' obligations insofar as they involved Walker. Luhrs was advised that in order to do so he had to make an unconditional offer of reinstatement to Walker. When he learned that Walker was earning about twice as much with Anchor Motor Freight as he had been earning when employed by Respondents, the logic of the situation would have impelled Luhrs to offer to unconditionally reinstate Walker because Luhrs could anticipate that such offer would be rejected. Walker was examined at the hearing more extensively than was Luhrs. Although Walker did not impress me as being an untruth-witness, I obtained the impression that Walker is not unsophisticated and, as to be expected, is anxious to prevail in this proceeding. He understood no less than Luhrs what he had to testify to in order to prevail. I must make my decision as to where the truth lies based upon the impression the witnesses made upon me, the relevant proceedings in the matter, including the Decision and Order of the Board (205 NLRB 1050) and the inherent probabilities of the situation. It is my opinion, and I find, that in June 1973 Respondents made to Walker an unconditional offer of reinstatement to his former position, which Walker rejected, and therefore Respondents' backpay obligations to Walker terminated as of that date.

Conclusions

I find that the backpay period in this proceeding terminated in June 1973. Accordingly, I find that there is due to Thomas Walker as backpay the sum of \$2,098, together with interest thereon. I direct that the Respondents make payment of such sum to Thomas Walker.

Dated at Washington, D.C.

s/ Herbert Silberman
Administrative Law Judge

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KENSTON TRUCKING COMPANY, INC.,
KENSTON WAREHOUSING CORP., AND
RHEIN EXPRESS, INC.

and

Case 29-CA-3184

GEORGE HILL, an Individual

and

Case 29-CA-2888

LOCAL 808, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA

SUPPLEMENTAL DECISION AND ORDER

On October 3, 1975, Administrative Law Judge Herbert Silberman issued the attached Supplemental Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in answer to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, conclusions, and recommendation of the Administrative Law Judge, to the extent consistent herewith.

The General Counsel excepts to the Administrative Law Judge's finding that the backpay period for Thomas Walker terminated in June 1973. We find merit to this exception.

According to the General Counsel, Walker's backpay period ran between May 12, 1972 and February 21, 1975. No

Supplemental Decision and Order (Cont.)

backpay, however, is claimed for the fourth quarter of 1972 and for all of 1973 because during this period Walker's quarterly earnings exceeded what his earnings would have been had he continued in Respondent's employ.

Respondents 1/ argued at the hearing that Respondent's president, Luhrs, made Walker a valid offer of reinstatement sometime during June 1973 2/ and for that reason, Walker's backpay period should have terminated as of that date.

At the hearing, Walker and Luhrs gave conflicting accounts of the conversation during which, Respondent contends, the alleged unconditional offer was made. At the time this conversation occurred, Walker was employed by Anchor Motor Freight. The Administrative Law Judge credited Luhrs' testimony and concluded that an unconditional offer of reinstatement had been made to Walker during this conversation. We do not agree that Luhrs' testimony supports this conclusion.

The record indicates that the alleged unconditional offer was phrased as a question. When asked what the language of the alleged offer had been, Luhrs answered, "... I did ask, you know, if he was satisfied where he was or if he wanted to come back to work, so forth." This testimony indicates that Luhrs was asking Walker what his job preferences were, and, as such, appears to be directed at determining Walker's interest in or availability for a job with Respondent. For this reason, we do not find Luhrs' question could have

1/ The decision regarding the unfair labor practice involving Walker is reported at 205 NLRB 1050 (1973). The Respondent in that case is Kenston Trucking Company, Inc. On March 11, 1975, a stipulation was entered into by Kenston Trucking Company, Inc., Kenston Warehousing Corp. and Rhein Express, Inc., which provides that for the purpose of the instant proceeding Rhein Express, Inc. and Kenston Warehousing Corp. "constitute an integrated enterprise and are the successors in interest to Kenston Trucking Company, Inc. the Respondent in these proceedings."

2/ The Administrative Law Judge found this conversation occurred on either June 10 or June 17, 1973.

Supplemental Decision and Order (Cont.)

been interpreted as a categorical invitation to return to work. 3/ Since a dischargee is not required to make a choice of employment before receiving an unconditional offer of reinstatement, 4/ Walker had no obligation to make a decision about returning to work during his conversation with Luhrs. We, therefore, find Respondent's backpay obligation to Walker was not terminated in June 1973. Since Respondent did not contend that Walker's backpay period should have terminated for any other reason before February 21, 1975, we further find that the backpay period did not terminate until this latter date.

Accordingly, as the backpay specification indicates that Respondent's backpay obligation is \$12,544, plus interest at the rate of 6 percent per annum, we shall order that Respondent reimburse Walker for that amount.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Kenston Trucking Company, Inc., Kenston Warehousing Corp. and Rhein Express, Inc., Brooklyn, New York, their officers, agents, successors, and assigns, shall:

3/ See Leeding Sales Co., Inc., 155 NLRB 755, 756 (1965). We do not find that Walker's inquiry about what Luhrs would pay meant that Walker interpreted Luhrs' question as an offer of reinstatement to his former job. For this reason, and because of the way the question was phrased, this case is distinguishable from Moro Motors, Ltd., 216 NLRB No. 29 (1975). There, the Board found that the employer's remark amounted to an unconditional offer of reinstatement for the specific job formally held by the discriminatee, even though phrased as a question. The Board decided the employer's question was specific enough to have been construed as an offer of reinstatement and found that the discriminatee had actually interpreted the question as such. Member Fanning adheres to his Moro dissent.

4/ Leeding Sales Co., supra.

Supplemental Decision and Order (Cont.)

1. Pay to the discriminatee, Thomas Walker, as net backpay the amount of \$12,544.

2. In addition to the above amount, pay interest at the rate of 6 percent per annum computed on the basis of each quarterly amount of net backpay due, less any tax withholding required by law.

Dated, Washington, D.C. March 30, 1976

s/ John H. Fanning, Member

s/ John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER JENKINS, dissenting in part:

I disagree with the finding of my colleagues that Respondent did not make a valid offer of reinstatement to Walker in June 1973. As between the conflicting accounts of the meeting between Walker and Respondent's president, Luhrs, the Administrative Law Judge credited Luhrs' testimony. The record discloses no basis for reversing that credibility resolution. Luhrs' testimony showed that Luhrs asked Walker "if he was willing to come back to work for me", that Walker asked what the rate of pay would be, that Luhrs answered, "it would be at the rate of pay that he was making when he left", and that Walker then laughed and showed Luhrs his previous week's pay stub indicating he was getting much more than Respondent had paid, and that, after some discussion, Luhrs told Walker he would be foolish to leave a job that paid so well.

While the language is not as precise as lawyers might employ, it seems plain to me that these facts constitute a proper offer to reinstate Walker, which terminated Respondent's backpay liability. The fact that questions instead of declarative sentences were used hardly precludes the making of an offer, any more than threats lose their character because couched as questions.

Dated, Washington, D.C.
March 30, 1976

s/ Howard Jenkins, Jr., Member
NATIONAL LABOR RELATIONS BOARD

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

Dorothy Conannon

9th day of July, 1976

RICHARD M. GABA
NOTARY PUBLIC, State of New York
No. 30-6436625
Qualified in Nassau County
Commission Expires March 30, 1998